

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 18, 2001

STATE OF TENNESSEE v. JOHN MALONE

**Direct Appeal from the Criminal Court for Davidson County
No. 99-C-2194 J. Randall Wyatt, Jr., Judge**

No. M2000-02265-CCA-R3-CD - Filed November 16, 2001

The defendant was convicted of misdemeanor theft and aggravated assault. The defendant appealed the conviction for aggravated assault. The defendant contends the evidence was insufficient to support his conviction for aggravated assault and that the victim consented to the assault. See Tenn. Code Ann. § 39-13-104(1). We hold that there was sufficient evidence to uphold the conviction and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Monte D. Watkins, Nashville, Tennessee, for the appellant, John Malone.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Erik Regis Herbert, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant, John Malone, was indicted, tried by a jury and convicted of aggravated assault, a Class C felony, in Davidson County. He was sentenced as a Range III persistent offender to ten years in the Tennessee Department of Correction. The defendant's sole issue on appeal is whether there was sufficient evidence to support his conviction of aggravated assault.¹

¹ Defendant was also convicted of misdemeanor theft and sentenced to 11 months, 29 days to be served concurrently with his sentence for aggravated assault.

Facts

The testimony of the victim, Mr. Harb Hamad Jarab, reveals that on July 17, 1999, he was working in Davidson County in a Dollar Mania store that he owns. At approximately 4:00 p.m., the defendant entered the store. From a surveillance video camera, the victim observed the defendant place several items of clothing into his sweat pants. The victim then locked the front door and when the defendant tried to leave, the victim stated that if the defendant would put the clothes back then the door would be unlocked. The victim testified that the defendant returned some of the items, but kept some in his sweat pants. The victim told the defendant that the defendant would have to wait for the police. The defendant then pulled a screwdriver on the victim and threatened to harm the victim if he did not unlock the door. The victim further testified that he told the defendant to "[g]o ahead" and hit him. The defendant then ran to the back of the building and tried to escape out of another door. After finding the back door locked, he returned to the front of the building at which time he again threatened the victim. The defendant also tried to hit the front door, which did not open. At this point he also struck the victim on the forearm with the screwdriver. During this exchange, the victim asked his business partner to give him a gun. However, the victim testified that he did not have a gun and that this statement was intended to scare the defendant. He said he was scared of the defendant because of the screwdriver. The defendant tried to run from the victim and at this point, lost the screwdriver. It was later found between some aisles in the store. The injury on the victim's arm caused by the screwdriver did not require medical treatment.

Officer Todd Rasnic testified that he observed cuts on the victim's left forearm and shoulder, and a scratch on his neck. He did not, however, notice any injuries to the defendant. He also testified that some items from the store were discovered on the defendant's person. Also, Rasnic was the one who picked up the screwdriver from the floor of the store.

Officer Rasnic arrested the defendant, and the defendant told him that he had a drug habit and was trying to get money to support his habit. Officer Rasnic testified that the defendant admitted to him that the defendant threatened the victim with a screwdriver.

The defendant's former trial counsel, Jody Bell, from the Public Defender's office, testified that she observed the defendant shortly after his arrest. She testified that she remembered seeing certain injuries on his face and body; however, she could not remember what type of injuries she saw. She also remembered having an intern in the Public Defender's office take pictures of the defendant and his alleged injuries, but she did not know what happened to such photographs.

The defendant testified on his own behalf that he was addicted to cocaine and in order to support his habit, he had begun stealing clothing from various businesses, which resulted in several arrests and convictions. He further testified that he entered Dollar Mania on July 17, 1999, with the express intent of stealing clothing that could be of value to him. He testified that after he stuffed his pants with stolen goods he tried to leave. However, the victim stopped him from leaving at the door. He testified that he tried to leave without success through the back of the store and when he returned to the front area, the victim attacked him with the screwdriver.

The defendant denied ever having any weapon or stabbing the victim. He stated that the victim was slashing at him and that the victim made a couple of slash marks on the defendant's arm and thigh. He also stated that when Officer Rasnic arrived, the victim had the screwdriver in his hand.

Lastly, the defendant testified that he did admit to Officer Rasnic that he had a substance abuse problem and that he entered this particular store in order to steal clothes. However, the defendant denied that he told Officer Rasnic that he had a screwdriver or that he attacked the victim. On rebuttal, Officer Rasnic testified that the victim's injuries appeared to have been inflicted from the head of screwdriver. Officer Rasnic further testified that he retrieved the screwdriver from the scene.

Analysis

When a challenge is made on appeal to the sufficiency of the convicting evidence, this court must adhere to certain well-established principles. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W. 2d 913, 914 (Tenn. 1982). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences, which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). This court may not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Viewing the evidence under these criteria, it is the responsibility of this court to affirm the conviction if the proof was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson, 443 U.S. at 317, 99 S. Ct. at 2789, 61 L. Ed. 2d 560; State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The defendant was convicted of aggravated assault by causing bodily injury while using or displaying a deadly weapon, a Class C felony. As charged in the indictment, an assault occurs when the defendant

- (1) Intentionally, knowingly or recklessly cause[d] bodily injury to another.
- Tenn. Code Ann. § 39-13-101. The assault is aggravated if the defendant
- (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and:
 - (A) Causes serious bodily injury to another; or
 - (B) Uses or displays a deadly weapon.

Tenn. Code Ann. § 39-13-102(a)(1). A screwdriver may be considered a deadly weapon. See Tenn. Code Ann. § 39-11-106(a)(5)(B); State v. Ewing, No. 01C01-9612-CR-00531, 1998 WL 321932, at *6 (Tenn. Crim. App., filed June 19, 1998, at Nashville).

In the instant case, we conclude sufficient evidence exists to support the aggravated assault conviction. Viewed in a light most favorable to the State, the victim's testimony reveals that the defendant pulled a screwdriver and threatened to harm the victim if he did not unlock the door and allow the defendant to escape with stolen goods. The victim said that the defendant ran to the back of the building and tried to escape out of another door after the victim refused to open the front door. After finding that he could not escape out the back, the defendant returned to the front and at this time, threatened the victim again. At this point, the defendant struck the victim on the forearm with the screwdriver. Officer Rasnic testified that he observed wounds on the victim's arms and neck and that they were consistent with the victim's assertion that the defendant struck him with a screwdriver.

The threat of bodily harm was carried out with a deadly weapon, which is an element of aggravated assault. When viewed in a light most favorable to the State, the evidence at trial showed that the defendant acted with a deadly weapon, the screwdriver. Therefore, we conclude the evidence is sufficient to support the jury's finding of aggravated assault.

We must next determine if the victim consented to the aggravated assault. The defendant alleges that the victim consented to the attack and relies on Tennessee Code Annotated § 39-13-104, which states that effective consent is a defense to the infliction of bodily harm if the injury consented to "is not serious." Tenn. Code Ann. § 39-13-104(1). We disagree. This court notes that the Sentencing Commission Comments contemplate the application of this statute within the context of sporting activities, and the like, in which two parties agree to engage in conduct where some contact is expected or anticipated. The facts of the case do not fit within the consent statute, and we conclude the statute is not applicable.

CONCLUSION

Accordingly, we affirm the judgment of the trial court.

JOHN EVERETT WILLIAMS, JUDGE